EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation, Plaintiff, v. **PUBLIC SERVICE COMMISSION OF UTAH; STEPHEN F. MECHAM, CONSTANCE B. WHITE, CLARK D. JONES,** Commissioners of the Public Service Commission of Utah; and **WESTERN WIRELESS CORPORATION**, a Washington corporation, Defendants.	**ORDER** **Case No. 2: 97 CV 558**

Before the Court are the cross motions for summary judgment of Plaintiff US West Communications, Inc. ("US West") and Defendant Western Wireless Corporation ("Western").

BACKGROUND

On February 8, 1996, Congress passed the Telecommunications Act of 1996 (the "Act") to promote competition and reduce regulation in the local telephone market. As part of the Act, existing telephone service providers like US West, referred to as "incumbent local exchange carriers," "incumbent LECs," or "ILECs," are obligated to interconnect with new entrants into the telecommunications market, including wireless or mobile carriers like Western, referred to as "Commercial Mobile Radio Service Providers" or "CMRS providers." Towards that end, the

Act obligates ILECs to enter into "reciprocal compensation arrangements" with entrants pursuant to which each carrier compensates the other for local telephone traffic that is transported and terminated on the other carrier's network. *47 U.S.C. § 251(b)(5).* Prior to the Act, incumbent LECs were not legally required to compensate other carriers for such usage, but other carriers were required to compensate incumbent LECs.

When an entrant asks an incumbent to provide interconnection, the Act obligates both parties to negotiate in good faith to accomplish the requirements of the Act. *Id. at §§ 251(c)(1), 252(a)(1).* The Act provides further that any entrant with a preexisting agreement with an incumbent may request re-negotiation of the agreement to conform it with the Act. To the extent issues remain unresolved, either party may request arbitration by the state public utilities commission. *Id. at § 252(b).* The final agreement between the incumbent and the entrant, whether arrived at through negotiation or arbitration, must be approved by the state commission. *Id. at § 252(e)(1).* Either party may seek review in federal district court. *Id. at § 252(e)(6).* If the state commission fails to act within the timetables provided in the Act, the Federal Communications Commission ("FCC") assumes the state commission's responsibilities. *Id. at § 252(e)(5).*

Prior to the passage of the Act, US West and Western had entered into an interconnection agreement that provided a rate for Western's use of US West's lines and services. On March 29, 1996, Western petitioned US West to renegotiate their agreement to conform with the Act. Negotiations ensued, and, on September 6, 1996, the open issues were submitted to the Utah State Public Service Commission (the "Commission") for arbitration. On January 2, 1997, the Commission ruled that Western was entitled to receive reciprocal compensation retroactively

beginning March 29, 1996, the date Western requested renegotiation. The Commission also found that Western's mobile switching center ("MSC") should be treated as equivalent to US West's tandem switch system for the purpose of setting the rate of reciprocal compensation US West must pay Western.

US West then filed this lawsuit, challenging the Commission's finding on those two points, namely: (1) the effective date from which Western is entitled to interim reciprocal compensation and (2) the interconnection rate Western is entitled to receive for the transportation and termination on its system of calls originated on US West's system, the "going forward rate."[1]

STANDARD OF REVIEW

The parties agree that questions of law, such as whether a state commission procedurally and substantively complied with the Act, are to be reviewed de novo, in accordance with the standard of review enunciated in *U S West Communications, Inc. v. Hix,* 986 F. Supp.13, 18 (D. Colo. 1997). US West and Western disagree as to the standard of review to be applied to other questions, particularly questions involving a state commission's interpretation of the Act.

US West argues that the state commissions are not entitled to deference as are federal agencies pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984) (according deference to federal agency's statutory interpretation when Congressional intent is not clear from statute's express language). US West urges this Court to follow *Hix* in this regard. The *Hix* court concluded that state commissions do not function analogously to

[1] Initially, US West also asserted that an unconstitutional taking had occurred. During oral argument of the motions, counsel for US West stated that US West no longer asserts a Fifth Amendment takings claim as an independent cause of action.

federal agencies under the Act because they are not subject to continuous Congressional oversight and do not have "extensive experience or expertise in the specific mandate of the Act — promoting competition in the local exchange market." *Hix*, 986 F. Supp. at 17-18. The *Hix* court also noted that affording deference to the state commissions would be antithetical to the coherent and uniform construction of the Act. *Id.* at 17.

Western argues that *Hix* has been superceded in this regard. Western's argument is based on a footnote in *AT & T Corp. v. Iowa Utilities Board,* 119 S.Ct. 721 (1999), in which the Supreme Court noted that the Act's delegation of federal policymaking to state administrative agencies created a unique scheme and left open many attendant issues. The Supreme Court said, "Such a scheme is decidedly novel, and the attendant legal questions, such as whether federal courts must defer to state agency interpretations of federal law are novel as well." *Id.* at 733 n.10.

This Court recognizes that the Supreme Court did not substantively address the issue of the amount of deference district courts are to afford the state commissions. But, in acknowledging the uniqueness of the Act's scheme, the Supreme Court left open the possibility that application of a deferential standard could be warranted. Two considerations persuade this Court to do so, notwithstanding the distinctions between the state commissions and federal agencies drawn in *Hix*.

First is the fact that Congress specifically charged the state commissions with interpreting and carrying out the Act in the first instance. At the very least, this suggests that Congress viewed the state commissions as having relevant expertise. Second is the fact that if the FCC were to act for a state commission that did not accept its responsibilities under the Act, a

reviewing court would give deference to the FCC, as a federal agency, under *Chevron.* Application of a deferential standard to the state commission's interpretations of the Act avoids this anomaly.

DISCUSSION

A. Did the Commission lawfully set the effective date from which Western is entitled to interim reciprocal compensation as March 26, 1996?

US West challenges the Commission's application of one of the administrative rules issued by the FCC to implement the Act. The rules were released on August 8, 1996, but were not effective until November 1, 1996. *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499 (1996) ("First Report and Order"). Section 51.717, commonly known as the interim reciprocal compensation rule, provides that, as of the date a competing carrier petitions an incumbent LEC to negotiate a new agreement until the time that an interconnection agreement is approved by the state, the competing carrier may charge the incumbent LEC the same rates for termination of telecommunications traffic that the incumbent LEC charges the competing carrier. *47 C.F.R. § 51.717(b) (1998).*[2]

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[2] In its entirety, 47 C.F.R. 51.717 provides:

> (a) Any CMRS provider that operates under an arrangement with an LEC that was established before August 8, 1996, and that provides for non-reciprocal compensation for transport and termination of local telecommunications traffic is entitled to renegotiate these arrangements with no termination liability or other contract penalties.
> (b) From the date that a CMRS provider makes a request under paragraph (a) of this section until a new arrangement has been either arbitrated or negotiated and has been approved by a state PCS, the CMRS provider shall be entitled to assess upon the incumbent LEC the same rates for the transport and termination of local telecommunications traffic that the LEC assesses upon the CMRS provider pursuant to the pre-existing arrangement.

US West argues that the Commission improperly interpreted and applied § 51.717 to require US West to provide reciprocal compensation to Western retroactively to a date that pre-dates the effective date of the rule, namely, March 29, 1996, the date Western petitioned US West to renegotiate the existing agreement.

US West argues that on March 29, 1996, there was no obligation to provide reciprocal compensation to a CMRS provider until after an agreement was approved by a state commission, citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), in which the Supreme Court held that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Id.* at 207.

US West points out that the statutory provisions authorizing the FCC to make implementing rules do not authorize retroactive rulemaking and that the FCC indicated in the *First Report and Order* that the obligation to provide reciprocal compensation was to attach "as of the effective date of the rules we adopt pursuant to this order." ¶ *1094.* As further support for its position, US West argues that retroactive application of § 51.717 is precluded by the language used in the provision itself, which states that a CMRS provider shall be entitled to interim reciprocal compensation from the date a request is made "under paragraph (a) of this section."

Western argues that the effective date of § 51.717 is irrelevant inasmuch as the express language of the Act gives CMRS providers the right to interim reciprocal compensation. Western argues that § 251(b)(5), which was effective on the date on which the Act was signed into law, February 8, 1996, provides that each local exchange carrier has the duty "to establish

reciprocal compensation arrangements for the transport and termination of telecommunications." According to Western, § 51.717 merely specifies a date from which each CMRS provider may receive interim reciprocal compensation, a term that does not appear in the Act itself.

Since the Act itself requires reciprocal compensation, the question of when, after the passage of the Act, an incumbent LEC's duty to provide reciprocal compensation begins does not present a question concerning the Commission's compliance with the Act. Thus, this Court applies a deferential standard of review to the Commission's interpretation of § 51.717. The Commission's interpretation meets this standard. This is the conclusion reached by three other district courts that have considered the issue — New Mexico, North Dakota, and Montana.[3]

B. Did the Commission act lawfully in requiring US West to compensate Western for the services Western provides to US West at the same rate that Western compensates US West?

As explained above, the Act requires interconnecting carriers to establish reciprocal compensation arrangements for the transport and termination of traffic on each others' networks. *47 U.S.C. § 251(b)(5).* The parties do not dispute that the tandem switches utilized by US West are different from the MSC switches utilized by Western, and more expensive to operate.

Tandem switches are routing switches and never operate alone. In simplified terms, a tandem switch is used to interconnect "end offices" in a common geographic area. An end office switch generally connects calls from one caller to another within a smaller geographic area. So, any call delivered to US West's tandem switch must pass through both a tandem switch and an

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[3] *U.S. West Communications, Inc. v. Reinbold*, No. A1-97-025 (D.N.D. May 14, 1999); *US West Communications, Inc. v. Serna*, Civ. No. 97-124 JP/JHG (D.N.M. Aug. 25, 1999); *US West Communications, Inc. v. Anderson*, CV 97-9-H-CCL (D. Mont. Sept. 14, 1999).

end office switch before reaching its destination.

Western always delivers calls originating on its system and destined for an end user on US West's system to US West's tandem switch. Thus, US West always incurs two switching costs to deliver a call originating on Western's system. In contrast, Western's MSCs only have one switch. So, when a US West customer calls a Western customer's cellular phone, Western incurs only one switching cost.

The Commission adopted a requirement that US West compensate Western for the services Western provides to US West at the same rate that Western compensates US West for the use of US West's tandem switches. The Commission did so after concluding that Western's switches perform comparable functions and serve a larger geographic area.

US West's attack begins with the proposition that § 252(d)(2)(A) requires state commissions to arrive at a reasonable approximation of the costs of each carrier associated with the transport and termination on each carrier's facilities of calls originating on the other carrier's network. US West then argues that the fact that Western's system serves a geographic area that is at least as large as the geographic area served by US West is an insufficient basis upon which to sustain the Commission's ruling and that the required functional similarity analysis performed by the Commission was arbitrary and capricious.

At least one court has agreed with US West that a geographic analysis alone is an insufficient basis upon which to uphold a rate determination and that "the rate for a wireless switch should be determined by whether it functions like a tandem switch, and geography should be considered." *US West Communications, Inc. v. Washington Utils. and Transp. Comm'n*, No. C97-5686BJR, slip op. at 6 (W.D. Wash. Sept. 3, 1998). This Court also agrees.

US West argues that the functional similarity analysis performed by the Commission was arbitrary and capricious because the Commission compared Western's MSCs, on the one hand, with US West's tandem switches and US West's end operating switches, as they operate together, on the other hand, in violation of the *First Report and Order,* which, US West argues, instructed the Commission to compare Western's MSCs with US West's tandem switches standing alone. The *First Report and Order* provides:

> We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch. In such event, **states shall also consider whether new technologies** (e.g., fiber ring or wireless networks) **perform functions similar to those performed by an incumbent LEC's tandem switch** and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.

¶ *1090* (emphasis added). US West asks this Court to remand the matter to the Commission to require the Commission to determine whether Western's MSCs perform the same function as US West's tandem switches alone.

In the view of this Court, US West approaches the matter too myopically. The *First Report and Order* directs "states to establish presumptive symmetrical rates based on the incumbent LEC's costs for transport and termination of traffic when arbitrating disputes under section 252(d)(2)." ¶ *1089.* A forward-looking cost study is necessary only when an entrant wants to rebut that presumption by establishing that its costs are greater than the incumbents. *Id.*

In light of these principles, US West has not shown that there is insufficient evidence upon which the Commission could base its conclusion that Western's costs approximate US West's. Nor is this Court convinced that the only permissible interpretation of ¶ 1090 is the one advanced by US West, namely, that in performing a functional similarity analysis state commissions are limited to considering only the first layer of an ILEC's system.

CONCLUSION

For the reasons set forth herein, Western's motion for summary judgment is HEREBY GRANTED. US West's motion for summary judgment is HEREBY DENIED. The matter is dismissed; the parties are to bear their own costs.

DATED this 23rd day of November, 1999.

BY THE COURT:

/ Dale A. Kimball

DALE A. KIMBALL
United States District Judge

ksj

United States District Court
for the
District of Utah
November 24, 1999

* * MAILING CERTIFICATE OF CLERK * *

Re: 2:97-cv-00558

True and correct copies of the attached were mailed by the clerk to the following:

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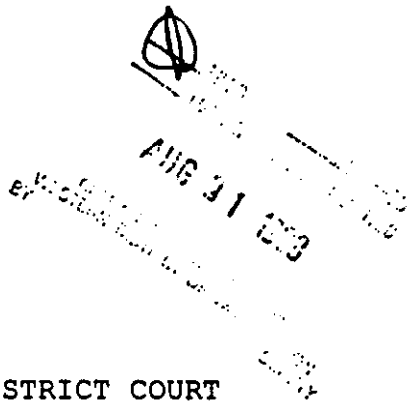
EXHIBIT 2



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

U S WEST COMMUNICATIONS, INC., Plaintiff, v. THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, et al. Defendants.	CASE NO. C97-5686BJR ORDER ON MOTIONS FOR SUMMARY JUDGMENT

U S West Communications, Inc. ("U S West") brought this action pursuant to the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 252(e)(6), for judicial review of a final agreement approved by the Washington Utilities and Transportation Commission ("WUTC") concerning interconnection between U S West and AT&T Wireless Services, Inc. ("AWS"). The defendants are AWS and the WUTC and its commissioners.

All parties have moved for summary judgment. U S West asserts that the agreement violates the Act because: (1) it denies U S West full cost recovery for transporting and

terminating AWS's traffic; (2) it improperly requires U S West to allow collocation of AWS's remote switching units; and (3) its provisions amount to an unconstitutional taking of U S West's property. AWS says that the agreement inadequately compensates it for U S West-originated calls transmitted over the AWS system. The court has fully considered all the papers filed. Because there is no genuine issue of material fact for trial, the case will be decided as a matter of law pursuant to Federal Rule of Civil Procedure 56.[1]

I. SCOPE AND STANDARD OF REVIEW

As to scope of review under 47 U.S.C. § 252(e)(6), the court confines consideration to the administrative record and will not hold a de novo proceeding. See United States v. Bianchi & Co., Inc., 373 U.S. 709, 715 (1963); see, e.g., GTE South Inc. v. Morrison, No. 3:97CV493, slip op. at 6-7 (E.D. Va. May 19, 1998); U S West Communications, Inc. v. TCG Seattle, No. C97-354WD, slip op. at 3 (W.D. Wash. Jan. 22, 1998). Review of the final agreement extends necessarily to the underlying orders made by the WUTC throughout the arbitration period that became part of the agreement. See TCG Seattle, slip op. at 3.

As to the standard of review, the parties agree that a state agency's legal interpretation of the Telecommunications Act is

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[1] The court finds it unnecessary to hear oral argument due to the clarity of briefing, sufficiency of the record, and the similarity of most issues to cases decided by other courts.

reviewed de novo. See Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495 (9th Cir. 1997). This interpretation is not due deference as is a federal agency's under Chevron U.S.A. Inc. v. Natural Resources Defense Counsel Inc., 467 U.S. 837, 843 (1984), because a state agency lacks the impetus, expertise and capability to harmonize federal law that a federal agency has. See Orthopaedic Hosp., 103 F.3d at 1495-96.

The WUTC's factual findings, however, will be reviewed as to whether they are arbitrary or capricious. See MCIMetro Access Transmission Services, Inc. v. GTE Northwest, Inc., No. C97-742WD, slip op. at 4 (W.D. Wash. July 7, 1998). The Act authorizes the state commissions to hear evidence and set rates and schedules, subject to district court review of whether they have complied with the Act and FCC pronouncements. See 47 U.S.C. § 252(b)-(e); Iowa Utilities Bd. v. FCC, 120 F.3d 753, 806 (8th Cir. 1997), cert. granted, 118 S. Ct. 879 (1998).

II. U S WEST'S CLAIMS

A. Cost Recovery for Transport and Termination of Traffic

In determining the rate for transport and termination of traffic, the WUTC rejected U S West figures for the cost of capital, fill factors, and depreciation factors. It instead relied upon its determinations in Washington Utilities and Transportation Comm'n v. U S West Communications, Inc., WUTC, Fifteenth Supplemental Order, Docket No. UT-950200 (April 11,

1996) [hereinafter "Fifteenth Supplemental Order"], aff'd, U S West Communications, Inc. v. Washington Utilities and Transportation Comm'n, 134 Wash. 2d 74 (1997). U S West contends that this violated 47 U.S.C. § 252(d)(1) by referring to a "rate-of-return or other rate-based proceeding."

U S West's argument fails because the Fifteenth Supplemental Order was based not on rates of return but on an incremental cost methodology called TSLRIC. Fifteenth Supplemental Order at 80-82. This is the kind of methodology that all the parties agree was properly applied here. Further, the inputs in question do not rely upon a rate of return for accuracy. The WUTC did not act arbitrarily or capriciously by choosing its own properly derived figures over those of U S West.

B. Collocation of Remote Switching Equipment

U S West argues that the requirement that it collocate AWS's remote switching units (RSUs) in U S West's facilities violates the Act. It is incorrect.

Section 251(c)(6) provides that U S West has "[t]he duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier . . . ." The FCC defines "necessary" as "used" or "useful," not "indispensable." FCC Order ¶ 579. Thus, transmission equipment may be collocated and state commissions may designate additional

types of equipment to be collocated. FCC Order ¶ 580. The FCC held:

> At this time, we do not impose a general requirement that switching equipment be collocated since it does not appear that it is used for the actual interconnection or access to unbundled network elements. We recognize, however, that modern technology has tended to blur the line between switching equipment and multiplexing equipment, which we permit to be collocated. We expect, in situations where the functionality of a particular piece of equipment is in dispute that state commissions will determine whether the equipment at issue is actually used for interconnection or access to unbundled elements.

FCC Order ¶ 581 (emphasis added).

The WUTC here determined that RSUs are equipment necessary for interconnection or access to unbundled network elements and that without RSUs AWS would be at a technical and economic disadvantage in the transmission and routing of telephone service. The WUTC distinguished between RSUs and fully equipped switching equipment. This determination was neither arbitrary nor capricious, was based on sufficient evidence, and was within the WUTC's discretion to decide.

C. Taking

U S West argues that the WUTC's approval of the agreement amounts to an unconstitutional taking. As Judge Dwyer noted:

> A taking claim under the United States Constitution is not ripe until (a) there is a final decision by the state regarding the property; and (b) the plaintiff has attempted to obtain just compensation for the property in state court. Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186-97 (1985).

TCG Seattle, slip op. at 10. These requirements have not been

met here. U S West's taking claim is dismissed without prejudice.

III. AWS'S COMPENSATION CLAIM FOR MSCs

The WUTC determined that AWS should be compensated at the end-office rate for land to mobile traffic terminated by its Mobile Switching Centers ("MSCs"). AWS argues that it should be compensated at the higher tandem rate.

The Act provides for "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier" on terms that reasonably approximate the additional costs of terminating such calls. 47 U.S.C. § 252(d)(2)(A). Tandem switching costs more than end-office switching because it entails an additional switching function. Recognizing this, the FCC concluded that "states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch." FCC Order ¶ 1090.

The parties dispute the effect of two sentences in the FCC Order:

> [S]tates shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination

> via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carriers's additional costs is the LEC tandem interconnection rate.

Id. This language supports two legal interpretations: (1) the rate for a wireless switch should be determined by whether it functions like a tandem switch, and geography should be considered; or (2) where a wireless switch serves a comparable area as that of a tandem switch, the rate should be that of a tandem switch. The first interpretation entails a detailed functional comparison of two technological systems. The second entails the automatic application of the tandem rate to any system that meets the geographic test.

The court finds that the first interpretation is more consistent with the Act, 47 U.S.C. § 252(d)(2)(A), and 47 C.F.R. § 51.711(a)(1), which read together provide that the rates of transport and termination of traffic should be symmetrical when the same kind of service is rendered, and that additional costs involved in call termination are relevant. The WUTC did not err as a matter of law in considering whether AWS's switches were so functionally similar to tandem switches as to justify the higher rate.

The WUTC found that the AWS's MSCs were not functionally equivalent to tandem switches. The arbitrator noted that tandem switching rates are higher because tandem switching necessarily involves two switching operations to terminate a call. In

contrast, traffic through MSCs generally does not involve that additional switch and consequent additional cost, regardless of the geographic area served by an MSC. The WUTC upheld the arbitrator's denial of tandem rates for those limited situations in which an MSC might perform additional switching functions because AWS never specified the proportion of calls for which this applied.

Comparing new technologies to more established ones entails detailed factual analyses. Here, the WUTC did not act arbitrarily or capriciously by deciding that MSCs do not function like tandem switches, and, therefore, that AWS is not entitled to compensation according to the tandem rate for traffic relayed through them.

IV. CONCLUSION

The court grants summary judgment in favor of AWS and the WUTC on U S West's claims regarding (1) cost recovery for transport and termination of traffic, and (2) collocation of remote switching units. It grants summary judgment in favor of U S West and the WUTC on AWS's claim regarding rates for Mobile Switching Centers. U S West's taking claim is dismissed without prejudice. As these rulings dispose of the case, judgment will be entered accordingly. No party will recover costs.

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The clerk is directed to send copies of this order to all counsel of record.

DATED at Seattle, Washington this 31st day of August, 1998.

Barbara Jacobs Rothstein

BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE